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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EMMET WALTER WENDT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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FILED

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

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I

JURISDICTIONAL STATEMENT

On February 23, 1966, a forty-seven count indictment was returned by the Grand Jury for the Southern District of California [C. T. 2-51]. <sup>1/</sup>

The indictment charged Don C. Boone, Donald John Nastali, Harold Steel Gray, Joseph Anthony Magdalik, Louis P. Barrios, Emmet Walter Wendt, Edward Mace S. Clark, Frank Yochan and Wesley J. Coverdill with violations of Title 18, United States Code, Section 641 and Title 18, United States Code, Section 371. The

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<sup>1/</sup> C. T. refers to Clerk's Transcript of Record.



first forty-six counts of the indictment charged various combinations of the defendants with receiving, concealing and selling aircraft engine parts having a value in excess of \$100, which parts as the defendants knew had been stolen from the United States Government. Count Forty-seven charged all of the defendants with a conspiracy to obtain, receive, conceal, possess and sell the items of Government property which were listed in Counts One through Forty-six.

Appellant Wendt was charged in Counts 12, 13, 35, 36, 40, 41, 45, 46 and 47 of the indictment [C. T. 12, 13, 35, 36, 40, 41, 45, 46 and 47-50]. At the close of the Government's case the court granted appellant's motion for judgment of acquittal on Counts 13, 35, 36, 40 and 45 [R. T. 1139, lines 3-5]. <sup>2/</sup> Appellant's case went to the jury on Counts 12, 41, 46 and 47.

Count 12 charged that on or about April 2, 1965 and continuing to September 15, 1965 defendant Edward Mace S. Clark and appellant Elmer Walter Wendt, received, concealed, with intent to convert to their own use, and retained, 127 Power Recovery Turbine Wheels, 262 Pistons, 27 Shields, 10 Gears, 50 Impeller Shafts, all having certain parts numbers and manufactured by Curtis-Wright, and which property having a value in excess of \$100 had been stolen from the United States as the defendants well knew.

Count 41 charged that on or about July 8, 1965 appellant Wendt and defendant Clark sold 35 Power Recovery Turbine Wheels,

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<sup>2/</sup> R. T. refers to Reporter's Transcript.



bearing certain serial numbers listed, which property had a value in excess of \$100 and as they knew had been stolen from the United States.

Count 46 charged that on or about August 27, 1965 appellant Wendt and defendant Clark sold 515 Pistons, with certain part numbers, which pistons were manufactured by Curtis-Wright, had a value in excess of \$100, and had been stolen from the United States as they well knew.

Count 47 charged that from prior to December 1964, and continuing until on or about November 15, 1965, the defendants and appellant Wendt conspired together to commit offenses against the laws of the United States as follows: to receive, conceal and retain with intent to convert to their own use, property of the United States having a value in excess of \$100, knowing that such property had been stolen or purloined from the United States. The purpose of the conspiracy was to obtain and sell the property listed in Counts 1 through 46, which property had been stolen from the Alameda Naval Air Station, Alameda, California. The conspiracy count goes on to list twenty-six overt acts. The appellant Wendt is named in overt acts number two, three, thirteen and twenty-six. Overt act number two charged that on or about April 1, 1965, defendant Clark had a conversation with appellant Wendt in Los Angeles. Number three charged that on or about June 25, 1965, in Los Angeles County, appellant Wendt paid defendant Gray \$3,000. Number thirteen charged that on or about May 13, 1965 defendant Don C. Boone had a telephone conversation with appellant



Wendt. Number twenty-six charged that on or about April 20, 1965, in Los Angeles County, appellant Wendt gave defendant Nastali \$5,000 in cash.

On March 7, 1966 all defendants appeared with counsel and pleaded not guilty [C. T. 52].

The jury was impaneled on May 2, 1966 [C. T. 62]. Trial was held from May 2 through 20, 1966 [C. T. 75].

On May 11, 1966 the Government rested and all defendants moved for judgment of acquittal [C. T. 67-68]. On May 12, 1966 the District Court granted a motion for judgment of acquittal as to appellant Wendt on Counts 13, 35, 36, 40 and 45 [C. T. 69].

On May 20, 1966 appellant Wendt was found guilty of Counts 12, 41, 46 and 47 [C. T. 57, 75].

On July 12, 1966 appellant Wendt was sentenced to the custody of the Attorney General for one year on each of the counts of which he was convicted, such sentences to run concurrently [C. T. 76-78].

Appellant Wendt filed a notice of appeal on August 1, 1966 [C. T. 80]. On August 29, 1966 the District Court ordered that the time for filing an appeal from the judgment be extended to include the late notice filed [C. T. 79].

The offenses occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 371 and 641. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.





## II

### STATUTE INVOLVED

Title 18, United States Code, Section 371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 641 provides:

"Whoever . . . steals, . . . or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any . . . thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted --

"Shall be fined not more than \$10,000 or



imprisoned not more than ten years, or both; . . . ."

### III

#### STATEMENT OF FACTS

The court instructed the jury that in order for the Government to meet its burden of proof on Counts 12, 41, and 46 of this case, it must establish four elements beyond a reasonable doubt. Those four elements are,

- (1) that there was property of the United States which was stolen;
- (2) that the defendant received, retained or sold such property with intent to convert it to his own use;
- (3) that the defendant knew that the property was stolen from the United States;
- (4) that the property had a value in excess of \$100 [R. T. 1625-1627].

The appellant contends only that the Government failed to prove the third element.

"The crux of this case and the obvious tenor of the defense at the time of trial and indeed upon this appeal by the appellant WENDT is that:

"(a) There was insufficient evidence to show that WENDT knew the property was stolen; and



"(b) That he received, retained or conveyed the same with knowledge that it was in fact stolen from the United States." (A. B. pp. 34-35).

As the appellant does not contest that the aircraft parts designated in Counts 12, 41 and 46 of the indictment were property of the United States Government, were stolen from the Government, and had a value in each count of more than \$100, the appellee will merely summarize the method of proof rather than proceed through an extensive cross-referencing of each of the aircraft parts to the numerous documents.

The testimony of Government witnesses established the following chain of title. The Government entered into contracts with Curtis-Wright Aircraft Corporation for the purchase of certain parts for the R-3350 aircraft engine. Mr. Elmer Sturm, Supervisor of the order division for Curtis-Wright, produced certain shipping documents. These shipping documents show the shipping of the type of parts charged in the indictment to the Alameda Naval Air Station [R. T. 23-37]. It was stipulated that these parts had been paid for by the Government and that the value of the parts in each count of the indictment was in excess of \$100 [R. T. 36-37; 130-131].

The documents produced by Mr. Sturm contain identifying information as to Government contract number, part number, nomenclature, shipping date and quantities. For example, Government Exhibit Number 149A contains document Number G 215109.



This document reflects shipment of various parts, including 43 pistons, part No. 147986 to Alameda, California. Exhibit No. 40 is a box containing one piston, part No. 147986 [R. T. 46]. The stenciled information on Exhibit No. 40 shows packaging date of "10/2/63" and No. "43". All other information as to nomenclature, part number, government stock number, destination and date correspond with the information on Exhibit No. 149A. Thus, this piston was one of 43 pistons shipped from Curtis-Wright to Alameda Naval Air Station on document No. G 215109.

Mr. Sturm further testified that all the parts, with the exception of the PRT wheels, contain a part number. The part numbers are identical on each of the pistons, shields, and shafts made by Curtis-Wright. The PRT wheels, however, contain individual serial numbers. No two serial numbers on these PRT wheels are the same [R. T. 77-78].

Mr. Henry L. Ainlay, Jr., Control Division officer of the supply department at the U.S. Naval Air Station, Alameda, California, testified that the parts shipped by Curtis-Wright Corporation under documents in Government Exhibit No. 149A-B were received by the Alameda Naval Air Station [R. T. 141-149].

The Government produced Exhibit No. 77. This exhibit is a summary of inventories taken of Curtis-Wright parts at the Alameda Naval Air Station in March, October and November of 1965 [R. T. 133-136]. This physical inventory is compared against a computerized record of the parts on hand [R. T. 193-195]. Exhibit No. 77 reflects that Alameda had shortages in all categories





of parts enumerated in the indictment. The shortages exceeded the quantities charged in the indictment.

Mr. William Verica was called as a witness. He was the disposal officer for the Aviation Supply office of the Department of Navy [R. T. 1513]. He controlled the disposal of surplus Navy aircraft parts throughout the world. He was given a list of all the parts mentioned in the indictment. He compared that list of parts, by part numbers, with those parts that the Navy has declared surplus in the two years previous to April 1965 [R. T. 1515-1538]. During that time three items were declared surplus. They were 22 carriers, 2,067 pinions, and 396 part No. 146888 [R. T. 1519-1520]. Wendt was not charged with receipt or sale of any of these parts.

During 1964 and 1965 Donald J. Nastali and Harold Steel Gray were partners in a business called Aero Service. Aero Service had offices in Burbank, California, and was engaged in the aircraft surplus ignition business [R. T. 296]. In December of 1964, Gray took a trip to the Oakland-San Francisco area [R. T. 294-295].

Gray entered into a dice game at the Oakland Inn and met a man named Tony Vierra. Vierra told Gray that he had some aircraft generators available and wished to sell them. Gray purchased the generators from Vierra and brought them back to Aero Service. Gray told Nastali that Vierra worked at the Alameda Naval Air Station and he believed that the generators came from the base. Gray thought the generators were stolen from Alameda



and Vierra had told Gray that he could get almost any Curtis-Wright parts Gray might want [R. T. 298].

James C. Clemons is a warehouseman at the Alameda Naval Air Station (hereinafter referred to as the "Alameda Facility") [R. T. 228-229]. On eight or ten occasions in 1965 he assisted in unlawfully removing aircraft parts from the Alameda Facility. He was given lists of part numbers to cross-reference through Navy manuals and locate the individual parts within the Alameda Facility [R. T. 233]. He would then place the parts on a pallet so they could be removed from the Facility [R. T. 234, 263-264].

The first time Clemons participated in this activity was in April of 1965. On that occasion Clemons and another employee, Butler, took parts from the Alameda Facility to a house in San Leandro owned by a man named Don Boone [R. T. 231-233]. There is a main gate at the Alameda Facility where people are checked in and out. On the occasion he and Butler took the parts through the gate they were not checked [R. T. 267].

Subsequent to this first transaction Clemons was present at three meetings off the base with Gray and Vierra. All three meetings took place at Mel's Bowling Alley. At the first meeting Gray asked Clemons about his job and whether he could cross-reference part numbers with Government stock numbers. Clemons replied that he could and Gray gave him a list of parts to locate. On the second two meetings Gray presented Clemons and Vierra with additional lists of part numbers [R. T. 234, 238-241].



Clemons helped locate these parts and set them aside for removal [R. T. 263-265].

On one occasion Clemons took 15 power recovery turbine wheels from the Alameda Facility to Gray at the Oakland Inn Motel [R. T. 241].

Clemons received \$1600 for his role in removing parts from the Alameda Facility [R. T. 248].

One week after Gray returned with the generators he and Nastali decided they would attempt to obtain more parts from Vierra. Gray called Jim Boone at James G. Boone Company and asked him if he was interested in Curtis-Wright parts. Boone stated he was and Gray called Vierra and told him that he would purchase various parts from him [R. T. 299-301]. They borrowed some money and Gray drove up to Oakland, obtained the parts, and brought them back to Burbank. Gray and Nastali delivered these parts to Jim Boone [R. T. 302]. Gray made one or two more trips up to Oakland and obtained parts which he delivered to Jim Boone [R. T. 303-304, 414-415].

Gray telephoned Mace Clark [R. T. 305]. Clark was in the aircraft surplus parts business [R. T. 1419]. Gray asked Clark if he knew anyone who wanted to buy power recovery turbine (hereafter PRT) units at \$250 apiece. The market value was approximately \$1,500 to \$2,000 each [R. T. 306]. Clark said he would inquire and a day later he came over to the Aero Service office. Clark, Gray and Nastali had a conversation about the PRT units and Clark asked "are these power recovery units stolen?" Gray



told Clark that "for \$250 they have to be stolen" [R. T. 306].

Clark stated he knew a man who had been caught stealing property from the Navy and he did not want to get involved. Gray explained to him that the person from whom he was obtaining the parts in Northern California was working in conjunction with a man named Johnson who was in charge of the inventory cards on these specific parts. He explained further that when the parts were taken off the base, Johnson would take the inventory control cards and re-route the specific parts down through another base or pull the card out and rip it up; for these reasons there was very little chance of getting caught. Clark replied, "O. K., swell" and the agreement was made for the purchase of the parts.

Gray called Vierra who said he would need \$2,500 in advance. Clark gave Gray a check for \$2,500 and Gray went to Northern California and brought down the new shipment. The shipment was turned over to Clark [R. T. 307].

Gray made additional trips to Northern California. On one of the trips Gray needed someone to ride up to San Francisco and back in the truck. He asked Jim Coverdill if he would like to accompany him to San Francisco to pick up the parts [R. T. 314-315]. Coverdill accompanied Gray and when he returned from Northern California, went to work at Aero-Service.

Subsequently, Gray took a trip to Texas. While Gray was in Texas, Vierra called Nastali from San Francisco. Vierra said he had another load of parts that Gray had ordered [R. T. 316]. Nastali told Vierra that he would have to come up and pick up the







parts. Nastali and Coverdill drove a pick-up truck to the Oakland Airport where they met Vierra. Vierra took them over to a Mr. Johnson's house where they loaded the material in the back of the truck [R. T. 317]. Nastali and Coverdill drove the truck back to Burbank and unloaded all of the parts into the back of their shop. They locked the doors and had just finished sorting the parts when Clark arrived.

Clark looked at the various parts and asked Nastali who was going to purchase them. Nastali stated that they were probably going to be sold to Jim Boone. Clark stated that he would be interested in purchasing them and Nastali quoted him a price of \$10,025. Clark said he didn't have the money at that time, but he knew someone else who did have the money [R. T. 318]. Clark left the shop and a short time later returned with appellant Wendt and introduced Wendt to Nastali. Wendt was engaged in the aircraft surplus parts business under the name Western Engine and Supply Company. He had had numerous dealings with the United States Government over the years [R. T. 1332-1335]. Wendt and Nastali discussed the purchase of various parts. Wendt agreed to buy all of the parts for \$10,000. He said that he would need a couple of days to obtain the money. Wendt and Clark left the shop [R. T. 320].

Wendt returned on April 2, 1965 with \$5,000. He wanted to give Nastali the money and take all the parts. Nastali told him to wait until Gray returned from Texas. On April 3, 1965, Gray, Nastali, Clark and Wendt met at Aero Service. Wendt offered to



pay \$5,000 at that time and take immediate delivery of the PRT wheels. He would take the balance of the parts when he paid the remaining cash. This arrangement was agreed upon and the four men took the PRT wheels from the shop and loaded them in Wendt's 1963 T-Bird [R. T. 321, 1352].

After loading the car the four men went back into the shop. Wendt asked Gray how many more parts he could obtain. Gray responded, "quite a bit" and Wendt said to him that "All the material that you can come up with I can take it all." [R. T. 322]. Gray and Nastali then told Wendt "Well, you know this stuff is stolen to start with." Wendt replied that he did know that it was stolen but that it was not a problem because he could cover up for it. He said, "I just got through buying out an inventory in South America. I can tell people it came from there and if worse comes to worse I can always ship it back to South America to cover it back up and then ship it back here to cover it up." [R. T. 322, lines 12-18].

On April 9, 1965, Wendt paid Nastali \$5,000, \$2,000 in cash and a \$3,000 check for the remainder of the parts. Nastali and Coverdill delivered the remainder of the parts to Wendt's house. The parts were put in his garage [R. T. 324, 1357].

The parts enumerated in Count 12 of the indictment are a portion of this first purchase. Wendt admitted in trial receiving the parts and later selling them to Air Motive, Incorporated and Harold Happe [R. T. 1358, 1362, 1364].

Count Thirteen of the indictment charged Wendt with selling

THE FIRST PART OF THE HISTORY OF THE  
LIFE OF THE LATE KING CHARLES THE FIRST  
BY JOHN BURNET  
IN TWO VOLUMES  
LONDON, 1704

THE SECOND PART OF THE HISTORY OF THE  
LIFE OF THE LATE KING CHARLES THE FIRST  
BY JOHN BURNET  
IN TWO VOLUMES  
LONDON, 1704

the parts obtained in this first purchase. He sold some of the PRT wheels to Air Motive, Incorporated. These wheels were not identified by serial number. Count 41 charged Wendt with selling thirty-five PRT wheels containing specific serial numbers. These wheels were sold to Air Motive, Incorporated. The court felt that there might be a duplication and dismissed Count 13 [R. T. 1091 - 1093, 1139].

Wendt made six other purchases from Gray and Nastali [R. T. 1360]. On these occasions Wendt would give Gray a list of the parts he wanted to purchase. Gray or Nastali would call Vierra and order the parts [R. T. 325]. Wendt would pay 50% of the purchase price in advance. He would make out a check to Gray and they would go to the bank and cash the check. Gray would take the money and fly to San Francisco. In San Francisco he would meet with Don Boone and Vierra. (Don Boone had been hired by Gray and Nastali to drive the parts down to Burbank.) Gray would pay Vierra, help Don Boone load up the parts, and then fly back to Burbank. Don Boone would haul the parts down to Burbank and he, Gray and Nastali would deliver them to Wendt's house. Wendt would then make out a check for the remaining 50% of the purchase price [R. T. 327-329].

Count 41 of the indictment charges that Wendt sold 35 PRT wheels and Count 46 charges that he sold 515 pistons. These PRT wheels and pistons were purchased by Wendt from Gray and Nastali as part of the last six transactions [R. T. 1360, 1368].

The 35 PRT wheels were sold to Air Motive, Incorporated



for \$27,000. Wendt sold the wheels in one lot of 15 wheels on July 7, 1965 for \$12,000 [R. T. 891] and one lot of 20 wheels on July 23, 1965 for \$15,000 [R. T. 881-882; 889-890].

The 515 pistons were sold by Wendt to Air Motive, Incorporated on August 27, 1965 [R. T. 886-887]. Wendt purchased the pistons from Gray and Nastali at prices ranging from Twenty-five to Thirty dollars a piston. He sold them to Air Motive, Incorporated at \$50 each for a total price of \$25,750 [R. T. 886-887; 1367-1368].

During the course of the purchases Wendt had long distance telephone conversations with Gray, Nastali and Don Boone. They called Wendt from the San Francisco area [R. T. 352, 355, 364, 1575].

On May 17 or 18, 1965 Don Boone received a phone call from Clark. Clark asked Don Boone if he could obtain additional aircraft parts. Clark instructed Boone to call him when he had an answer. He told Boone "If I don't answer my partner Wendt will answer and leave the message with him." [R. T. 512]. Don Boone called Vierra and Vierra said he could obtain the parts. Boone called the phone number Clark had given him. Wendt answered the telephone. He told Wendt to inform Clark that he could get the parts. Wendt said "fine" and hung up [R. T. 564].

The next morning Clark flew up to San Francisco. He met Boone at the San Francisco Airport and they drove to Hayward. Clark told Boone that Wendt would fly up the following day with the money [R. T. 513].







The following day, May 21, 1965, Clark met Wendt at the San Francisco Airport. Wendt told Clark that he had trouble raising the \$31,000. Wendt said he would try and obtain the money [R. T. 1438-1439]. Clark left Wendt and returned to San Leandro. At 1:00 that afternoon Clark met Don Boone at Bill's Bar in San Leandro, California. Shortly after 4:00 Wendt arrived at the Bar accompanied by Paul Long. Long represented Sky Parts, a surplus aircraft parts business located in San Leandro, California [R. T. 565]. Sky Parts was owned by Robert J. Dixon. Dixon and Wendt had a joint venture agreement whereby each of them would receive 50% of any profit on parts sold after the initial investment was returned [R. T. 957, 960]. Dixon had previously directed his banker to give Wendt cashiers checks in the amount of \$31,000 [R. T. 953, 954].

The four men sat in the bar and discussed the sale of the parts. Wendt and Long negotiated with Boone [R. T. 1556]. Don Boone requested \$28,000 for the parts [R. T. 567]. Long produced one Cashier's Check in the amount of \$20,000 and another in the amount of \$5,000. It was agreed that Boone would accept these checks at that time and Clark would pay him \$3,000 at a later date [R. T. 567-568]. During the negotiations Long asked Boone if "there had been any trouble getting the items through the gate." Boone replied "No, it's already at my house. It's already there." Wendt stated "There had never been any problems in the past." [R. T. 515]. The four men left Bill's Bar and went to Don Boone's bank and cashed the checks. The money was placed in an envelope



and retained by Long [R. T. 569]. They then proceeded to Don Boone's house. The parts were in Boone's garage. Clemons had delivered them earlier that day [R. T. 530]. Long, Clark and Wendt inspected the parts and loaded them into a rented truck [R. T. 516, 571]. Long gave Boone the envelope containing the money and Long and Wendt left in the truck [R. T. 516].

In August of 1965 Wendt and Dixon purchased an additional \$27, 500 worth of Curtis-Wright parts from Aero Service [R. T. 957-963].

#### IV

#### ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal. <sup>3/</sup>

1. The Trial Court erred in refusing to grant the motion of Appellant Emmet Walter Wendt for Judgment of Acquittal of the offenses charged in Counts 12, 41, 46 and 47 of the Indictment.

2. The evidence is insufficient as a matter of law to justify a finding of guilty as to Appellant Emmet Walter Wendt as to Counts 12, 41, 46 and 47 of the Indictment for the reason that there is no competent evidence to show that Appellant Wendt sold, received, concealed or retained any property with intent to convert it to his own use or gain knowing the same had been embezzled,

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<sup>3/</sup> Appellant's Opening Brief.



stolen or purloined from the United States of America.

V

ARGUMENT

- A. THE TRIAL COURT PROPERLY APPLIED  
THE LAW IN DENYING APPELLANT'S  
MOTION FOR JUDGMENT OF ACQUITTAL  
ON COUNTS 12, 41, 46 and 47.
- 

At the close of the Government's case appellant made a motion for judgment of acquittal on all counts in which he was charged [R. T. 1120]. The court after considering all argument and evidence granted appellant's motion as to Counts 13, 35, 36, 40 and 45 [R. T. 1139, lines 3-5].

In ruling on a motion for judgment of acquittal the court must consider the evidence, and all inferences which can reasonably be drawn therefrom, in the light most favorable to the Government. If the evidence, viewed in this light, is sufficient to lead a reasonably minded jury to conclusion of the defendant's guilt beyond a reasonable doubt, the case must be submitted to the jury.

Schino v. United States, 209 F.2d 67

(9th Cir. 1954);

Weaver v. United States, 374 F.2d 878

(5th Cir. 1967);

Smith v. United States, 343 F.2d 847

(6th Cir. 1965).

The thrust of appellant's motion was that the Government



had not met its burden of proving beyond a reasonable doubt that he knew the property was stolen from the United States Government [R. T. 1123-1125]. The court in colloquy with counsel questioned whether the appellant must know that the property was stolen from the United States Government [R. T. 1127]. Counsel then pointed out to the court the case of Souza v. United States, 304 F.2d 274 (9th Cir. 1962). A paragraph from the opinion was read to the court:

"MR. ROGAN: Your Honor, may I interrupt and cite you a case which has that kind of language in it?

"THE COURT: Yes, if you have got a case on that.

"MR. ROGAN: Just while you bring up that point, that's the case of Sousa against the United States.

"MR. BARNETT: I gave that to the Court.

"MR. JOHNSON: I will agree, Your Honor, You see --

"MR. ROGAN: Excuse me, Mr. Johnson. Let me read this one paragraph from the Sousa case. 'Not only was the jury instructed but the prosecution was required to prove beyond a reasonable doubt that the property described in Counts 2, 3 and 4 was property of the United States; that the same was sold or conveyed by appellant without





authority and that each sale or conveyance was made by appellant with knowledge on his part of ownership of the property by the United States but also with knowledge that the property had been stolen from the United States. '

"MR. JOHNSON: That was my understanding of the law, Judge.

"THE COURT: That seems to bear out your statement. " [R. T. 1127, line 13 to 1128, line 14].

Whatever the Court's view of the law prior to the discussion of the Souza case, he came to the conclusion that it was a necessary element of the Government's case to prove the appellant's knowledge that the property was stolen from the United States. His reply to counsel, "That seems to bear out your statement" would so indicate [R. T. 1128, lines 13-14]. Also in subsequent discussions with counsel, the court referred to the element of "from whom the property was stolen." [R. T. 1131]. Finally, the court instructed the jury that knowledge that the property was stolen and that it was stolen from the United States were necessary elements for the Government to prove beyond a reasonable doubt.

"Now, four essential elements are required to be proved beyond a reasonable doubt in order to establish the offenses set forth in those counts in the indictment alleging a receipt of stolen property, and those elements are these:



- "1. that property of the United States specified in each of these counts was in fact stolen;
- "2. that the defendant received such property and retained it with the intent to convert it to his own use;
- "3. that the time the defendant received and retained such property he did so willingly and with knowledge that the property was stolen from the United States;
- "4. that such property had a value exceeding \$100."

[R. T. 1626].

Likewise the court informed the jury that there were also four necessary elements which they must find beyond a reasonable doubt in order to find one of the defendants guilty of unauthorized sale of government property. He again pointed out to the jury that they must not only find that the property sold was property of the United States but that at the time the defendant sold the property they knew it was stolen from the United States [R. T. 1626].

These instructions are a correct statement of the law.

Souza v. United States, 304 F.2d 274

(9th Cir. 1962);

Findley v. United States, 362 F.2d 921

(10th Cir. 1966).

The court properly applied the law to the evidence in denying



appellant's motion for judgment of acquittal. The evidence is reviewed in the following argument.

B. THE EVIDENCE WAS SUFFICIENT  
TO SUPPORT THE VERDICT.

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The appellant argues that the evidence is not sufficient to prove he knew the aircraft parts were stolen from the United States Government. As the Government cannot look into the mind of the appellant it is required to meet this burden of proving appellant's state of mind by circumstantial evidence. The evidence in this case clearly supports the trier of facts determination that appellant had this knowledge.

Appellant had a conversation with Clark regarding the purchase of aircraft parts on April 1, 1965. Clark and appellant proceeded to Aero Service where they met with Nasatali [R. T. 317-319]. Appellant and Nasatali discussed the purchase of the parts. The parts were in the back of the shop. They were new and scarce. The Navy had not declared them surplus for the past two years. They were currently being used in Viet Nam [R. T. 107, 1515-1520]. They were contained in unopened and sealed Curtis-Wright boxes. The boxes had government contract numbers and descriptions stenciled on them [R. T. 37, 39, Exhibits 36-75]. Appellant had dealt with United States Government parts in the past [R. T. 1334]. Appellant agreed to purchase all the parts for \$10,000 [R. T. 320].



On April 2, 1965 appellant returned to Aero Service. He purchased the PRT wheels for \$5,000. They were loaded in the trunk of his car [R. T. 321]. Appellant went back into the shop. He said he would purchase all of the parts Gray and Nastali could obtain. He said he knew the parts were stolen. Nastali testified:

"So we turned around there and we said, 'Well, you know this stuff is stolen to start with,' and Mr. Wendt says 'yes'. He says, 'Yeh, but there is no problem.' He says, 'I can cover up for this material being here.' He says, 'Well, how' -- Mr. Wendt says, 'Well, I've got -- I just got through buying out an inventory in South America.' And if he did or not, I don't know. An airline inventory.

"He says, 'I can tell people it came from there and if worst comes to worst,' he said, 'I can always ship it back to South America to cover it back up and then ship it back here to cover it up.'" [R. T. 322].

Appellant made six other purchases from Gray and Nastali [R. T. 1360]. He gave Gray a list of parts he wanted [R. T. 325, 1360]. Gray informed appellant he could obtain the parts and appellant gave Gray 50% of the purchase price in advance. Gray flew up to San Francisco-Oakland area [R. T. 327 - 329]. Appellant had telephone conversation with Gray while Gray was in the San





Francisco area [R. T. 352, 355]. Gray returned to Burbank with the parts appellant had ordered.

Appellant purchased the parts at a low price [R. T. 306]. He purchased PRT wheels for \$300 apiece and promptly resold them for approximately \$770 apiece [R. T. 320, 890-891]. Similarly, he bought pistons for \$25 apiece and resold them for \$50 apiece [R. T. 886-887, 1367-1368].

In May of 1965, appellant and Clark began dealing directly with Boone in San Francisco. Appellant flew to San Francisco. He had a meeting at Bill's Bar in San Leandro with Boone, Clark and Long [R. T. 567-568]. San Leandro is near the Alameda Naval Air Station. The Alameda Naval Air Station had a main gate with a guard [R. T. 267]. During conversation in the bar appellant stated that there had never been any problem getting the parts through the gate in the past [R. T. 515]. Appellant and Long then took delivery of parts that were stored in a garage in San Leandro [R. T. 516, 530].

Appellant sold two other lots of parts in the San Francisco area [R. T. 928-930, 957-963]. He sold 10 new PRT wheels to Mr. Nielsen of Aircraft Engine Sales, Inc. Appellant told Nielsen he obtained the wheels from a Mr. Happe [R. T. 929]. Mr. Happe did not sell appellant any Curtis-Wright R-3350 parts in 1965 [R. T. 1565].

Viewing this evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the Government, the evidence was sufficient to support the verdict of guilty.



Noto v. United States, 367 U.S. 290 (1961);

Byrne v. United States, 327 F.2d 825

(9th Cir. 1964);

Mosco v. United States, 301 F.2d 180

(9th Cir. 1962).

## VI

### CONCLUSION

For the reasons stated above the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger A. Browning  
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